IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT TO MEET POINT FIRST RAISED IN ORAL ARGUMENT.

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THE GUNTHROP-WARREN PRINTING COMPANY, 310 WEST MADISON, CHICAGO

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A new theory on which to justify use of the Burlington formula having been suggested during oral argument, this supplement to the reply is filed.

The tax cannot be sustained as a tax on cars because:

I. The state makes no claim that it is a tax on the cars only, either (a) in its pleadings and briefs in this action, or (b) in its decisions construing the statute. If the state does not treat it as a tax on cars this court cannot.

> Appellee's brief—20: "Minnesota property as a going concern or *unitary enterprise.*"
>
> Appellee's brief—24: "to ascertain the value of the property within its borders *when the unit rule is applicable.*"

State v. *Gt. Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453, 454, where it is said:

> "It is quite plain that the gross earnings tax is a lien or commutation tax upon *all* the railroad company's property devoted to railroad uses within the state including the cars here in question, for said Section 2246 so states."

i. e., the property of the company must be taken as a whole, a unit, and the tax must be in proportion to the property *as a unit. The Burlington formula adds a tax on appellants property,* TAKEN AS A UNIT, *which increases as the amount of the greater part of that property* (the part having the greater taxable value) *decreases.*

To put it another way, if the number of its cars in the state remains substantially constant (the number gradually decreased from 1922 to 1930—R. 86—so that this factor or element of value became *decreasingly* important) the tax under the Burlington formula would increase as the amount of its more valuable other property (right of way, tracks, rolling stock on its own line, stations and terminals) decreased. This, we submit, is unequal and discriminatory taxation. The inequality and discrimination becomes still more apparent in the light of the admitted fact that other roads with literally a thousand times more property in the state, including cars on other lines, entirely escape this added burden, or it is proportionately decreased as the total value of their property, TAKEN AS A UNIT, *increases.*

That the tax is on all the property taken as a unit is held in the decision in this case, (R. 100) in addition to the special emphasis laid on the fact by appellee.

If it is treated as a tax on cars only, because it is a tax on the income from the use of the cars, it is unconstitutional for the reasons discussed in part I of appellant's original brief.

II. If it is a tax on cars only, it is discriminatory in that:

(a) Cars of other railroad companies in the state are not taxed (only 7 out of 44 in state, Ex. 21—Appellant's brief 35-37; R. 144, 152, 154, 165, 170).

(b) Cars of foreign railroad companies in the state are not taxed; *their situs for taxation purposes is exactly the same as that of appellant's cars.*

State v. *Gt. Northern*, 163 Minn. 88.

(c) It is double taxation since the freight earnings are already taxed.

(d) Private car lines are permitted to deduct per diem payments in making their returns.

III. That it is not actually, nor intended by the state to be, a tax on cars is shown by the fact that the cars are already taxed through their freight earnings, *without deduction for any car hire per diem payments.* The Minnesota tax on cars has been sustained only because the amount paid for per diem rental was deducted.

Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450, 456.

Cudahy Packing Co. v. *Minnesota*, 129 Minn. 30.

The tax paid by the using road is the full tax on the property it uses whether owned or leased.

Hopkins v. *Southern California Tel. Co.*, 275 U. S. 393, 402.

The state did not intend and does not permit double taxation.

State v. *St. Paul M. & M. R. R. Co.*, 30 Minn. 311, 15 N. W. 307.

State v. *St. Paul Union Depot*, 42 Minn. 142, 43 N. W. 840, 842.

State v. *Gt. Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453, 455, where it is said: "This avoids the stigma of double taxation and avoids any

appearance at attempts to tax interstate commerce."

State v. *Minnesota & I. Ry. Co.*, 106 Minn. 176; 118 N. W. 699, 681, where it is said: "If payment of the 3 per centum upon the amount so received would result in double taxation, then these items should not be included."

IV. If it is not a tax on the cars only, but is a tax on all the property of the company in the state it, under the Burlington formula, is unequal, discriminatory and therefore lacking in due process and is a burden on commerce.

(a) It admittedly has no appropriate relationship to the amount of property taxed. (R. 149, 151.)

(b) The smaller the road, *i.e.*, the less property it has in the state, the greater the percentage of credit balance taxed. (R. 144, 152, 154, 165, 170 and exhibits.)

(c) For 1922-28 it produces a tax for only seven of forty-four roads in the state; in 1935-6 a tax on but six of the forty-four. It is therefore unequal and discriminatory in the same class of taxpayers.

The requirement of uniformity is that it operate the same upon all in any one class.

State R. R. Tax Case, 92 U. S. 575.

V. The Burlington formula has not yet been adopted by the Public Examiner and the Tax Commission. It was

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(NOTE—Since 37 of the 44 roads in the state pay no such tax, they cannot well be expected to object. Those which pay a tax have a larger percentage of their mileage in the state and thus take credit for several hundred times the percentage allowed appellant of payments to other roads.)

only used in the settlement of certain lawsuits. (R. 124, 126, 132.)

(Counsel for appellee stated in oral argument that the fact was to the contrary.)

VI. Even if it may be adopted for future reports it cannot be made applicable to 1922-9.

(Cases cited p. 13 appellant's original brief.)

Respectfully submitted,

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